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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~880~~. 122.

THE STATE OF ARKANSAS AND JOHN A. HINKLE, AS SHERIFF OF INDEPENDENCE COUNTY, ARKANSAS, APPELLANTS,

vs.

CHARLES A. M. SCHLIERHOLZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED AUGUST 10, 1899.

(17,494.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 380.

THE STATE OF ARKANSAS AND JOHN A. HINKLE, AS SHERIFF OF INDEPENDENCE COUNTY, ARKANSAS, APPELLANTS,

vs.

CHARLES A. M. SCHLIERHOLZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 19, 1899.

1 To the Honorable John A. Williams, U. S. district judge, eastern district of Arkansas:

Your petitioner, Charles A. M. Schlierholz, would respectfully represent that he is now and for more than three years past has been a special agent of the General Land Office of the United States, under the Department of the Interior of the United States; that as such special agent he was directed by his superior officer, the Hon. Commissioner of the General Land Office of the United States, to go to the State of Arkansas and seize any timber unlawfully cut from the lands of the United States on the property of the United States, to brand *them* as such, and report to him for directions, or to inform the attorney of the United States for the said district thereof, that he may institute such proceedings, or direct him what to do with such timber as may be lawful and proper in the premises.

Your petitioner would further state that in conformity with said instructions and directions of the Commissioner of the General Land Office of the U. S. your petitioner, in the spring of 1898, came to the county of Independence, in the State of Arkansas, for the discharge of his duties as such special agent, in strict conformity with the directions and regulations of said Commissioner, seized several rafts of timber which had been unlawfully cut from the lands of the United States and were the property of the U. S., and in order to identify them on having been seized by him, as aforesaid, he branded *them* with the letters "U. S.;" all of which acts were done by him in the performance of his duties as such special agent, as aforesaid, and under the regulations and instructions of said General Land Office.

That at the spring term, 1899, of the Independence circuit court the grand jury of said county, at the instigation of certain parties, who desired to embarrass and prevent your petitioner from
2 discharging his duties as such officer, returned two true bills of indictment against him, but which he has not yet seen nor been able to see, on which warrants of arrest were issued against him out of said court, directed to the sheriff of the said county of Independence, copies of which are herewith filed, marked 1 & 2.

That by virtue of said warrants the said sheriff arrested your petitioner and now holds him in his custody and prevents him from discharging his duties as such officer.

Your petitioner submits that for any lawful acts done by him in the discharge of his duties as such special agent and under the directions of his said superior officer he is not amenable to the said State court, and that unless released by this court from said imprisonment, which is unlawful, he will be unable to perform his duties as an officer.

Wherefore he prays for a writ of *habeas corpus* in order that the cause of his imprisonment may be inquired into, and that pending these proceedings he may be permitted to give bail for his appearance to the marshal of the United States, and that upon the hearing hereof he be discharged.

CH. A. M. SCHLIERHOLZ,
By JACOB TRIEBER,
U. S. Attorney.

U. S. OF AMERICA, }
East. Dist. of Arkansas. }

The petitioner, Ch. A. M. Schlierholz, states on oath that the statements in the foregoing petition are true.

CHAS. A. M. SCHLIERHOLZ.

Subscriber and sworn to before me this 3rd day of May, 1899.

JOSEPH W. PARSE, *Clerk.*

Upon reading the within petition it is ordered by me that the clerk of the United States district court for the northern division of the eastern dist. of Arkansas issue a writ of *habeas corpus* for
3 the petitioner, Charles A. M. Schlierholz, directed to the sheriff of Independence county, Arkansas, and have served a copy of the said writ on the said sheriff, and also on the attorney for the State of Arkansas for the third judicial circuit, and make them returnable forthwith, and that pending such proceedings the said Schlierholz be placed in the custody of the United States marshall of this district, and upon executing a bond to the United States in the sum of $500.00, to abide the action in this cause, he be released.

Witness my hand as U. S. judge of the eastern district of Arkansas this 23rd day of May, 1899.

JNO. A. WILLIAMS,
U. S. Judge.

(Filed in my office May 23rd, 1899.

JOSEPH W. PARSE, *Clerk.*)

4 The President of the United States to the sheriff of Independence county, Arkansas:

You are commanded to have the body of Charles A. M. Schlierholz, detained in your custody, as it is said, together with the day and cause of his being taken, before the Hon. John A. Williams, United States district judge for the eastern district of Arkansas, at his chambers, in the city of Batesville, Arkansas, forthwith, and then and there state in writing the term and cause of his imprisonment and produce your authority for so doing; and hereof you are not to fail under the heavy penalties denounced by law against those who disobey this writ, and to submit to and receive all those things which shall then and there be adjudged in this behalf.

And the marshal of the United States for the eastern district of Arkansas will serve this writ by delivering a copy to the said sheriff of Independence county, and also to S. D. Campbell, Esq., the attorney for the State of Arkansas for the third judicial circuit.

This writ is issued in pursuance of the order of the Hon. John A. Williams, judge, as aforesaid, directed to me, as clerk of the district court of the United States for the northern division of the eastern district of Arkansas.

In testimony whereof witness the Hon. John A. Williams, judge

of said district court, and the seal of said court, this 23rd day of May, 1899.

(Signed) JOSEPH W. PARSE, *Clerk.*

5 *In re* CHARLES A. M. SCHLIERHOLZ.

To the Hon. John A. Williams, judge of the district court for the northern division of the eastern district of the State of Arkansas:

The State of Arkansas, by S. D. Campbell, her attorney, and being joined in this petition by John A. Hinkle, sheriff, respectfully pray your honor, before whom the above-entitled proceedings are pending, to refer said proceedings to the district court for the northern division of the eastern district of the State of Arkansas, the said court being now in session at Batesville, Arkansas, in its regular May term, 1899, that said cause be docketed in said court, and that your honor hear said proceedings sitting as said court, to the end that all of said proceedings may be of record in said court and the orders thereon be the orders and judgement of said court.

S. D. CAMPBELL,

Prosecution Attorney for the 3rd Judicial Circuit of Arkansas for State of Arkansas and John A. Hinkle.

6 To the Honorable John A. Williams, judge of the district court for the northern division of the eastern district of the State of Arkansas:

John A. Hinkle, as sheriff of Independence county, State of Arkansas, to whom the annexed writ is directed, has now here before your honor the body of Charles A. M. Schlierholz, therein named, as thereby commanded; and I certify that the cause of detention of the said Charles A. M. Schlierholz is a warrant commitment directed to me, as such sheriff of Independence county, in whose custody the said Charles A. M. Schlierholz was and is by virtue of such warrant, which was duly issued by the clerk of the circuit court of Independence county, State of Arkansas, I having taken the said Charles A. M. Schlierholz into my custody under said warrant in Independence county, Arkansas, on the 23rd day of May, 1899. A copy of said warrant is hereto annexed, marked Exhibit "A" hereto, and made a part hereof (which warrant is numbered 410); which said warrant was issued upon an indictment, duly returned into the circuit court of said Independence county, State of Arkansas, by a grand jury of said Independence county on the 7th day of April, 1899, the same being a day of the spring term, 1899, of said circuit court, the said Charles A. M. Schlierholz being charged in said indictment with unlawfully taking possession of timber in violation of the statute laws of the State of Arkansas.

And, further responding, the said John A. Hinkle, as such sheriff of Independence county, says in answer to the writ herein—

That he also has the said Charles A. M. Schlierholz in his custody, and he certifies that the cause of the detention of the said Charles A. M. Schlierholz is a warrant commitment directed to him

by the clerk of the circuit court of Independence county, State of Arkansas, I having taken said Charles A. M. Schlierholz into
7 my custody under said *said* warrant, in Independence county, Arkansas, on the 23rd day of May, 1899, a copy of which warrant is hereto annexed, marked Exhibit "B," and made a part hereof, which said warrant is numbered 409; which said warrant was issued upon an indictment, duly returned into the circuit court of Independence county, State of Arkansas, by the grand jury of said Independence county on the 7th day of April, 1899, the same being a day of the spring term, 1899, of the said circuit court, the said Charles A. M. Schlierholz being charged in the said indictment with unlawfully marking timber in violation of the statute laws of the State of Arkansas.

Given under my hand as sheriff of said Independence county, Arkansas, this 26th day of May, 1899.

(Signed) JOHN A. HINKLE, *Sheriff.*

Filed in my office May 26th, 1899.

JOSEPH W. PARSE, *Clerk.*

8 *Bench Warrant.*

State of Arkansas to any sheriff, constable, or policeman of this State:

You are commanded forthwith to arrest Charles A. M. Schlierholz and bring him before the Independence circuit court to answer an indictment in that court against him for the offense of unlawfully taking possession of timber, or, if the court be adjourned for the term, that you deliver him to the jailor of Independence county.

Witness my hand and the seal of said court this 21st day of April, A. D. 1899.

WILL HAIL, *Clerk,*
By T. H. DEARING, *D. C.*

(Indorsed on back as follows:) No. 410. Bench warrant. Independence county. State of Arkansas *vs.* Chas. A. M. Schlierholz. The defendant has been admitted to bail in the sum of two hundred dollars, and the same may be taken by the sheriff of the county in which he may be arrested or by the sheriff of Independence county. Will Hail, clerk, by T. H. Dearing, D. C.

9 *Bench Warrant.*

State of Arkansas to any sheriff, constable, or policeman of this State:

You are commanded forthwith to arrest Charles A. M. Schlierholz and bring him before the Independence circuit court to answer an indictment in that court against him for the offense of unlawfully marking timber, or, if the court be adjourned for the term, that you deliver him to the jailor of Independence county.

Witness my hand and the seal of the said court this 21st day of April, A. D. 1899.

WILL HAIL, *Clerk*,
By T. H. DEARING, *D. C.*

Indorsed on the back as follows: No. 409. Bench warrant. Independence county. State of Arkansas *vs.* Chas. A. M. Schlierholz. The defendant is to be admitted to bail in the sum of two hundred dollars, and the same — be taken up by the sheriff of the county in which he may be arrested, or by the sheriff of Independence county. Will Hail, clerk, by T. H. Dearing, D. C.

10 To the Honorable John A. Williams, judge of the district court for the northern division of the eastern district of the State of Arkansas:

The State of Arkansas, by S. D. Campbell, prosecuting attorney for the third judicial district thereof, for its response to the petition of Charles A. M. Schlierholz herein states that Charles A. M. Schlierholz, misconceiving *and* being outside of his duties as special agent of the General Land Office of the United States and outside of his instructions, and contrary to the laws of the United States and all rules of any department thereof, and without process of any kind or any authority of law, but ignoring all laws, regulations, and requirements of the United States or the departments thereof, on or about the 10th day of April, 1898, made personal seizures of the timber of C. W. Hamilton, J. M. Hamilton, and W. J. Keener, said timber then and there belonging to and being in the possession of said C. W. Hamilton, J. M. Hamilton, and W. J. Keener, and placed the mark "U. S." upon said timber, said acts being in direct violation of sections 6140 and 6142 of Sandels and Hill's Digest of the Statutes of the State of Arkansas.

That on the 7th day of April, 1899, the same being a day of the spring term of the circuit court of Independence county, said court having jurisdiction of such offenses, the grand jury thereof duly returned into open court an indictment for unlawfully marking timber against the said Charles A. M. Schlierholz, which indictment is numbered 409, a certified copy of which is hereto attached as Exhibit "B" and made a part hereof; and on the same day said grand jury duly returned into open court against the said Schlierholz an indictment charging said Schlierholz with unlawfully taking possession of timber; a certified copy of said indictment is hereto attached as Exhibit "A" and made a part hereof.

11 And thereafter, on the 21st day of April, 1899, bench warrants were duly issued out of said court on said indictments, respectively, which were made exhibits to the petition herein, on which said warrants was indorsed the order of said courts allowing the defendant to be admitted to bail in the sum of two hundred dollars in each case for his appearance at the next (fall) term of the said court.

Copies of said warrants are exhibited with the sheriff's response

herein and made a part hereof, and that the sheriff arrested and had in his custody the said Schlierholz by virtue of the said warrants aforesaid.

Respondant denies that the timber so seized was unlawfully cut from any lands of the United States, but says the same was the property of the said C. W. Hamilton, J. M. Hamilton, and W. J. Keener, and says that petitioner had no authority by virtue of any laws or rules or instructions of any department of the Government of the United States to make personal seizures of said timber or to mark or brand such timber so personally seized by said petitioner.

Respondant denies that petitioner was in the discharge of his duties as such special agent when making such seizures and branding and marking such timber aforesaid, and denies that he was acting under any regulations or instructions of the General Land Office of the United States, which authorized him to take personal possession of the timber by threats and intimidations against the owners and parties in possession of said timber, which was resorted to by the said petitioner for the purpose of getting possession of said timber.

Denies that the grand jury of the Independence county circuit court returned said indictments at the investigation of any parties who desired to embar-ass the petitioner in the discharge of any duty imposed upon him by the United States, but that said indictments were returned by the grand jury as they were required by their oaths to do, and acting under the instructions of the judge of said court in the fearless and impartial discharge of their duty
12 under the law and the oaths of said grand jurors.

Respondent says that its courts are fully and fairly constituted to afford the said Schlierholz a full and fair opportunity to be heard of and concerning any defense he may have in the said prosecution against him, and he is guaranteed by the constitution and laws of the said State a fair and impartial trial in the courts thereof.

And respondent further says that by reason of the matters and things set out therein that your honor, as judge of the district court of the United States, should not grant the prayer of petitioner for a discharge from the jurisdiction of the said State court.

Wherefore he prays that the writ of *habeas corpus* be denied and set aside, and that the defendant be remanded to the custody of the sheriff of Independence county.

(Signed) S. D. CAMPBELL,
Prosecuting Attorney.

EXHIBIT "A."

n the Independence Circuit Court, Spring Term, 1899.

STATE OF ARKANSAS
against
CHARLES A. M. SCHLIERHOLZ. } Indictment.

grand jury of Independence county, in the name and by hority of the State of Arkansas, accuse Charles A. M. Schlier- the crime of unlawfully taking possession of timber, com- as follows, to wit:

said Charles A. M. Schlierholz, in the county and State afore- n the 10th day of April, 1898, did unlawfully take possession ain logs and sticks of timber lying and being in White river, l county and State, the said Charles A. M. Schlierholz then here not being the owner of said logs and sticks of timber ot being the agent of such owner, against the peace and y of the State of Arkansas.

II.

l the grand jury aforesaid, in the name and by the authority aid and by way of charging the same offense in a different accuse the said Charles A. M. Schlierholz of the crime of fully taking possession of timber, committed as follows, to

t the said Charles A. M. Schlierholz, in the county and State aid, on the 10th day of April, 1898, did unlawfully take pos- n of certain logs and sticks of timber lying and being on the s of White river, in the said county and State, the said Charles Schlierholz then and there not being the owner of said logs ticks of timber and not being the agent of such owner, against eace and dignity of the State of Arkansas.

S. D. CAMPBELL,
Prosecuting Att'y.

d indictment is endorsed as follows, to wit: No. 410. State of nsas *v.* Charles A. M. Schlierholz. A true bill. J. C. McGuire, an. Indictment for unlawfully taking possession of timber. esses: C. W. Hamilton, J. M. Hamilton, W. J. Keener. Filed 7th, 1899, in open court, in the presence of the entire grand by the foreman thereof. W. A. Hail, clerk, by T. H. Dearing,

E OF ARKANSAS,
County of Independence. }

Will Hail, clerk of the circuit court of the county and State esaid, do hereby certify that the above and foregoing is a full, , and correct copy of an indictment against Charles A. M.

Schlierholz and all indorsements thereon now on file in my office and numbered 410.

In witness whereof I have hereunto set my hand and the seal of said court this 24th day of May, 1899.

[SEAL.] WILL HAIL, *Clerk.*

14 EXHIBIT "B."

In the Independence Circuit Court, Spring Term, 1899.

STATE OF ARKANSAS
against
CHARLES A. M. SCHLIERHOLZ. } Indictment.

The grand jury of Independence county, in the name and by the authority of the State of Arkansas, accuse Charles A. M. Schlierholz of the crime of unlawfully marking timber, committed as follows, to wit:

The said Charles A. M. Schlierholz, in the county and State aforesaid, on the 10th day of April, 1898, did unlawfully make and place and cause to be made and placed the mark consisting of the letters, to wit, "U. S." upon certain logs and sticks of timber then and there being upon and in White river, in said county and State, the said Charles A. M. Schlierholz then and there not being the owner of said logs and sticks of timber and not being the agent of such owner, against the peace and dignity of the State of Arkansas.

II.

And by way of charging the same offense in a different mode, the grand jury aforesaid, in the name and by the authority aforesaid, accuse the said Charles A. M. Schlierholz of the crime of unlawfully marking timber, committed as follows, to wit:

The said Charles A. M. Schlierholz, in the county and State aforesaid, on the 10th day of April, 1898, did unlawfully make and place and cause to be made and placed the mark consisting of the letters, to wit, "U. S." upon certain logs and sticks of timber then and there being upon and near the banks and shores of White river, in said county and State, the said Charles A. M. Schlierholz then and there not being the owner of said logs and sticks of timber and not being the agent of such owner, against the peace and dignity of the State of Arkansas.

S. D. CAMPBELL,
Prosecuting Attorney.

Said indictment is endorsed as follows: No. 409. State of Arkansas *v.* Charles A. M. Schlierholz. A true bill. J. C. McGuire, foreman. Indictment for unlawfully marking timber. Witnesses: C. W. Hamilton, J. M. Hamilton, W. J. Keener. Filed April 17th, 1899, in open court, in the presence of the entire grand jury, by the foreman thereof. W. A. Hail, clerk, by T. H. Dearing, D. C.

E OF ARKANSAS,
County of Independence.

Will Hail, clerk of the circuit court of the county and State said, do hereby certify that the above and foregoing is a full, and correct copy of an indictment against Charles A. M. Schlier- and all endorsements thereon now on file in my office and bered 409.

witness where- I have hereunto set my hand and have affixed seal of said court this the 24th day of May, 1899.

WILL HAIL, *Clerk.*

Re CHARLES A. M. SCHLIERHOLZ.

Now, on this day, comes John A. Hinkle, sheriff of Independence nty, and on his motion this cause is ordered to be transferred to district court of the United States for the northern division of eastern district of Arkansas; and thereupon came said sheriff State of Arkansas, by S. D. Campbell, Esq., State's attorney, file a response to the petition herein; and thereupon this cause ne on for hearing, both parties being ready, and the court, hav- heard the evidence, finds that the said petitioner, Charles A. M. lierholz, was in the performance of his duties as a special agent the General Land Office of the United States, and the actions rged in the said indictments set out in the response were per- med by him as such officer and in strict conformity with the les and regulations of the Secretary of the Interior of the United tes, and that his detention and arrest by the sheriff of Independ- ce county, State of Arkansas, was illegal and void.

It is therefore ordered and adjudged by the court that the said harles A. M. Schlierholz be discharged from the custody of said eriff under the writ in the petition and response set out and go nce without day.

And at the request of the attorney for the State 30 days' time is anted for a bill of exceptions.

In the United States District Court for the Northern Division of the Eastern District of Arkansas.

CHARLES A. M. SCHLIERHOLZ, *Ex Parte.*

Be it remembered that at a term of the United States district ourt for the northern division of the eastern district of Arkansas, olden at Batesville, Arkansas, in the proceeding for the discharge f Charles A. M. Schlierholz, under *habeas corpus*, on the 26th day f May, 1899, being a day of the May term, 1899, of said court, n the hearing if said petition, the following evidence was intro- uced and exceptions were saved, to wit:

"On behalf of the petitioner and respondents, the State and Hinkle, sheriff, the following facts were agreed upon by counsel nd are to be read at the trial of this cause:

The petitioner was indicted by the grand jury of the Independence county circuit court at the spring term, 1899, in two cases, two copies of which are filed with the response of the sheriff and the State; that the petitioner, Charles A. M. Schlierholz, at the time he made the seizures and branded the same with the brand of the United States, was a special agent of the General Land Office of the United States, duly commissioned as prescribed by law; that he is a resident and citizen of the State of Missouri and was sent to the State of Arkansas by his superior officer, the Commissioner of the General Land Office, with instructions and directions to investigate certain alleged trespasses committed in the State of Arkansas on the public domain by parties cutting unlawfully timber from lands belonging to the United States; that he had instructions which were furnished hi*n* by the Department of the Interior and which had been prepared by the Commissioner of the General Land Office and approved by the Secretary of the Interior
17 of the United States, which were the following:

'That any special agent is directed to seize any timber cut and taken away from the lands of the United States wherever it may be found and — whosever possession it may be found.' 'That whenever any special agent finds any timber in the possession of any person which he is satisfied from an investigation made by him has been unlawfully cut from the lands of the United States he shall seize the same from any person in the possession of the same wheresoever found and brand the same as the property of the United States with the brand "U.S.," provided that the party in possession of the same does not resist such seizure or same does not cause a breach of the peace, but if the party in whose possession it is resists such seizure or it is likely to cause a breach of the peace he shall cause the attorney of the United States for the district to institute legal proceedings for the seizure or recovery of such timber, and any timber thus seized by the land department, through its officers or special agents, may be disposed of by that department in such manner as it may determine.'

That the department furnished to the said Schlierholz a branding iron with the letters 'U. S.' on it; that the timber seized and branded, for which acts these indictments *for which acts these indictments* were found, was at the time in the possession of the persons whose names are indorsed as witnesses on the indictments and was seized by the said Schlierholz while he was acting as such special agent of the General Land Office without resistance on the part of the persons in whose possession he found it, but was seized over and notwithstanding their protest, they at the time claiming ownership of the said timber; that at the time the said seizures were made the said Schlierholz believed that the said timber had been unlawfully cut from the public domain; that he reported the seizures immediately to the General Land Office, and his actions were ap-
18 proved by the Commissioner.

That at the time said seizures were made and the timber branded he had no writ or process from any court, but acted with no authority other than the directions and rules and regulations of

General Land Office of the United States, as hereinbefore re-
ed.

The respondent Hinkle had the prisoner in his custody by virtue
the warrants issued by the clerk of the Independence county
cuit court, Arkansas, copies of which are filed with the petition,
d that said warrants were in due form of law and based on the
o indictments filed with the response.

(Signed) JACOB TRIEBER,
U. S. Attorney, for Petitioner.
S. D. CAMPBELL,
Att'y for Respondents."

And to that part of the above statement of facts relating to the
les and regulations furnished said Schlierholz by the Commis-
oner of the General Land Office and the instructions and directions
om said Commissioner and department, and also to that part re-
ting to the furnishing of the branding iron with the letters
U. S." to said Schlierholz, the respondents, State of Arkansas and
inkle, by their attorney, on the ground that such evidence was
nmaterial and irrelevant, at the time objected, and, their objections
eing overruled, they duly excepted thereto, which exceptions are
oted of record.

And this being all the evidence introduced upon said hearing by
ither side, except the petition for and writ of *habeas corpus* and
ie response of the State of Arkansas thereto and the return
ereto of John A. Hinkle as sheriff of Independence county,
Arkansas.

9 (Thereupon the court found "that the petitioner, Charles
A. M. Schlierholz, was in the performance of his duties as a
pecial agent of the General Land Office of the United States, and
he actions charged in the said indictments set out in the response
were performed by him as such officer and in strict conformity with
he rules and regulations of the Secretary of the Interior of the
Jnited States, and that his arrest and detention by the sheriff of
Independence county, State of Arkansas, is illegal and void;" to
which findings the respondents, State of Arkansas and Hinkle, at
he time duly saved their exceptions, which are noted of record,
nd the court thereupon discharged said Charles A. M. Schlierholz
rom the custody of said sheriff; to which order and action of the
ourt the said respondants at the time excepted, and their excep
ions are noted of record.)

This bill of evidence and exceptions now being presented to the
court within the thirty days allowed for so doing, to the end that it
may be signed by the judge and made a part of the record herein,
the same is now accordingly signed by the judge of the said court
and ordered to be made a part of the record in said cause.

JNO. A. WILLIAMS, *Judge.*

20 In the United States District Court for the Northern Division of the Eastern District of Arkansas.

CHARLES A. M. SCHLIERHOLZ, *Ex Parte.*

Assignment of Error.

Come the State of Arkansas and John A. Hinkle, as sheriff of Independence county, Arkansas, and assign as errors in the decree of the honorable the United States district court for the northern division of the eastern district of Arkansas herein the following causes:

1. That under the terms of the acts of Congress relating to proceedings in *habeas corpus* there was no jurisdiction of the said court to release the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, as sheriff of Independence county, State of Arkansas, under the warrants exhibited herein.

2. That the said court, upon discovering the said petitioner, Charles A. M. Schlierholz, was held under warrants issued by a court of said State for improperly taking possession of and marking timber without any process of law, should have remanded him to the State officer and not discharged him from said process.

3. That said court ignored that provision of the Constitution of the United States, being the fourth amendment, which protects the people against unreasonable seizures.

4. That said court ignored the provisions of said Constitution, being the fifth amendment thereto, which says that no person shall be deprived of his property without due process of law, and
21 that private property shall not be taken for public use without just compensation.

5. That said court ignored the provision of said Constitution of the United States, being the eleventh amendment thereto, which reserves to the States or to the people therein the powers not delegated to the United States.

6. That by the decision of said court the jurisdiction of the circuit court of the said State of Arkansas to try the petitioner upon indictment duly found is taken away without providing a remedy whereby the petitioner may be made answerable for a disregard of its laws, he at the same time not being in the legal discharge of any duty upon legal warrant duly issued, under any act of Congress in such cases made and provided.

7. That the court erred in permitting the introduction in evidence of the rules, regulations, and instructions under which said Schlierholz acted.

And for the errors aforesaid the said State of Arkansas and said John A. Hinkle as such sheriff pray an appeal from the decree of said district court to the Supreme Court of the United States, and that the decree of said court in releasing said Charles A. M. Schlierholz be reversed, set aside, and held for naught.

(Signed) JEFF. DAVIS,
Attorney General of Ark.,
S. D. CAMPBELL,
Prosecuting Attorney for 3rd Judicial District of Arkansas
Attorneys for State of Arkansas and John A. Hinkle, Sheriff.

22 C. A. M. SCHLIERHOLZ, *Ex Parte.*

State of Arkansas and John A. Hinkle, sheriff of Independence county, Arkansas, by Jeff. Davis, attorney general of the said State, and S. D. Campbell, prosecuting attorney for the third judicial circuit for said State, their attorneys, having presented their bills of exceptions, the same is now duly signed by the judge of this court and ordered to be filed and made a part of the record in this cause; and the State of Arkansas and John A. Hinkle, as such sheriff, by their said attorneys, having filed their assignment of errors and praying an appeal from the decree of the court discharging Charles A. M. Schlierholz from the custody of John A. Hinkle, sheriff of Independence county, Arkansas, to the Supreme Court of the United States, the same is hereby granted, and the said appellants have been required to file their bond for the costs of this appeal in the penal sum of two hundred and fifty dollars, and said bond being herewith exhibited, the same is hereby approved.

And at the request of the said State of Arkansas and John A. Hinkle, as sheriff, the following questions, among others involved herein, are certified to the said Supreme Court of the United States:

1. Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence county, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.

2. Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence county, Arkansas, to be dealt with by the Independence circuit court of the State, or to discharge him from said custody.

(Clerk will please enter this order.)

JNO. A. WILLIAMS, *Judge.*

23 Supreme Court of the United States.

STATE OF ARKANSAS and JOHN A. HINKLE, as Sheriff of Independence County, Arkansas, Appellants,
vs.
CHARLES A. M. SCHLIERHOLZ, Appellee.

Cost Bond.

Know all men by these presents that the State of Arkansas and John A. Hinkle, as sheriff of Independence county, Arkansas, as principals, and J. C. Yancey and S. D. Campbell, as sureties, are held and firmly bound unto Charles A. M. Schlierholz in the sum of two hundred and fifty dollars, to be paid to the said Charles A. M. Schlierholz, his executors or administrators; to which payment, well and truly — be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals; dated this 12th day of June, 1899.

Whereas the above-mentioned State of Arkansas and John A. Hinkle, as sheriff of Independence county, Arkansas, have prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered in the above-entitled cause upon petition for release under *habeas corpus* filed by the said Charles A. M. Schlierholz in the United States district court for the northern division of the eastern district of Arkansas by the said district court: Now, therefore, the condition of this obligation is such that if the said State of Arkansas and John A. Hinkle, as such sheriff, shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

24 Signed, sealed, and delivered in the presence of—

(Signed) STATE OF ARKANSAS AND
JOHN A. HINKLE,
Sheriff of Independence County, Ark.,
By S. D. CAMPBELL,
Prosecuting Att'y.
J. C. YANCEY.
S. D. CAMPBELL.

STATE OF ARKANSAS, }
County of Independence. }

J. C. Yancey and S. D. Campbell, being duly sworn, say on their separate oaths that they each and severally have and own personal and real property in the State of Arkansas in excess of their liabilities and exemptions and subject to execution to the amount of two hundred and fifty dollars.

(Signed) J. C. YANCEY.
S. D. CAMPBELL.

Subscribed and sworn to before me this 12th day of June, 1899.
J. F. GAUTNEY,
Notary Public.

Commission expires March 1st, 1901.

25 The United States of America to Chas. A. M. Schlierholz Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal granted by the district court of the United States for the northern division, eastern district of Arkansas, wherein State of Arkansas and John A. Hinkle, as sheriff of Independence county, Arkansas, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John A. Williams, judge of the district court, this 15th day of June, A. D. 1899.

JNO. A. WILLIAMS.

I, as attorney for Charles A. M. Schlierholz, and also as United States district attorney for the eastern district of Arkansas, hereby accept service and acknowledge same and receipt of copy of the foregoing citation, waiving any further or other service, on this the 15th day of June, A. D. 1899, at the city of Little Rock, Arkansas.

JACOB TRIEBER,
U. S. Att'y, for Chas. A. M. Schlierholz.

[Endorsed:] *Re* C. A. M. Schlierholz. Citation. Filed in my office June 15, 1899. Joseph W. Parse, clerk.

26 UNITED STATES OF AMERICA,
Northern Division of the Eastern District of the State of Arkansas, } ss:

I, Joseph W. Parse, clerk of the circuit & dist. courts for the northern division of the eastern district of Arkansas, do hereby certify that the attached, annexed, and foregoing 25 pages comprise a true, perfect, and complete transcript of all the original papers and record on file in my office in the case of State of Arkansas *versus* Charles A. M. Schlierholz.

Given under my hand and seal of office, at Batesville, Arkansas, on the 28th day of July, A. D. 1899.

{ The Seal of the Circuit Court, Northern Division, U. S. A., of East. Dist. Ark. }

JOSEPH W. PARSE.

Endorsed on cover: File No., 17,494. E. Arkansas D. C. U. S. Term No., 380. The State of Arkansas and John A. Hinkle, as sheriff of Independence county, Arkansas, appellants, *vs.* Charles A. M. Schlierholz. Filed August 19th, 1899.

14830

No. 380. 122

Brief of Cohn for Appellants

Filed Sept. 18, 1899.

Office Supreme Court U. S.
FILED
SEP 18 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

THE STATE OF ARKANSAS and JOHN A. HINKLE,
as Sheriff of Independence County, Ark.....Appellants,

v. **No. 380.**

CHARLES A. M. SCHLIERHOLZ.....Appellee.

BRIEF FOR APPELLANTS.

MORRIS M. COHN,
Attorney for Appellants.

JEFF DAVIS,
Attorney General.

S. D. CAMPBELL,
District Attorney.

J. C. YANCEY, Esq.,
Of Counsel.

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IN THE

Supreme Court of the United States.

THE STATE OF ARKANSAS and JOHN A. HINKLE,
as Sheriff of Independence County, Ark.....Appellants,

v. **No. 380.**

CHARLES A. M. SCHLIERHOLZ.....Appellee.

BRIEF FOR APPELLANTS.

Charles A. M. Schlierholz filed his petition before the honorable John A. Williams, United States District Judge for the Eastern District of Arkansas, for release under *habeas corpus*, from the custody of John A. Hinkle, sheriff of Independence County, Ark., who, he alleged, held him under warrants of arrest issued by the circuit court of said Independence County, upon indictments duly found by the grand jury of that county. He alleged that he, as special agent of the General Land Office of the United States, seized and marked certain rafts of timber with the letters "U. S.," under the orders and directions of the commissioner of the said office; said orders and directions being to "seize any timber unlawfully cut from the lands of the United States on the property of the United States" (Record, p. 1).

An order was duly made by the said district judge directing the clerk of the district court for the northern division of the district, to issue a writ of *habeas corpus* directed to the said sheriff, and providing that service of the writ should also be made upon the attorney of the State of Arkansas for the Third Judicial Circuit (id., 2).

The writ was issued by the said clerk on May 23, 1899, and was directed as well to S. D. Campbell, the attorney of the State for said Third Judicial Circuit, as to the sheriff of said county, and commanded production of the body of said petitioner forthwith, together with a return showing the term and cause of imprisonment, and a production of authority for such detention (id., 2, 3).

Upon the petition of the State and John A. Hinkle, the said sheriff, acting through the said Campbell, asking that the *habeas corpus* proceeding be transferred to the District Court for the Northern Division of the Eastern District of Arkansas (id., 3), an order was duly made transferring said proceeding to said district court (id., 9), and thereupon responses were filed by said State and said Hinkle, as such sheriff, to the said writ of *habeas corpus* (id., 3 to 6).

The sheriff's return shows that he detained said petitioner under two warrants of arrest issued by the Circuit Court of Independence County, Ark., upon two indictments duly found by the grand jury of the said county on the 7th day of April, 1899; in one case the charge being the unlawfully taking possession of timber in violation of the statute laws of the State of Arkansas, and in the other, the charge being that of unlawfully marking

timber in violation of the statute laws of said State. Copies of the warrants are exhibited. The response of the State shows that the said petitioner, wholly misconceiving and being outside of his duties as special agent of the General Land Office of the United States, and outside of his instructions, and contrary to the laws of the United States and all rules of any department, and without process of any kind or any authority of law, but ignoring all laws, regulations, etc., on or about April 10, 1898, seized the timber of C. W. Hamilton, J. M. Hamilton, and W. J. Keener, the same being at the time the property of and in the possession of the said C. W. Hamilton, J. M. Hamilton, and W. J. Keener, and placed the mark "U. S." upon the same, said acts being in violation of sections 6140 and 6142 of Sandels & Hill's Digest of the laws of the State. That on account of said illegal seizure and branding, indictments were found by the grand jury of said county against said petitioner, one charging him with the unlawful taking, and the other with the unlawful marking, of timber. And warrants were duly issued thereon, under which petitioner was arrested by the said sheriff. Copies of the indictments are attached to this response.

The State, in its response, denied that the timber so seized was unlawfully cut from any lands of the United States, but said that it was the property of the parties in whose custody it was found by said petitioner, and it denied that he had any authority to seize it from them without process and mark it "U. S."

It further denied that the said indictments were, as alleged by petitioner, procured at the instigation of any person, to em-

barrass the petitioner in the discharge of his duties as such special agent, but alleged that they were duly returned by the grand jury in pursuance of their oaths and the proper discharge of their duty, and it alleged that petitioner had an adequate remedy in its courts for any defense he might have.

The indorsements on the warrants authorized the sheriff to admit the accused to bail in the sum of $200 in each case.

The testimony in the case, as agreed upon by the parties, shows that C. A. M. Schlierholz was sent to the State of Arkansas by the Commissioner of the General Land Office, with instructions and directions to investigate certain alleged trespasses committed in the State of Arkansas on the public domain by parties unlawfully cutting timber from land belonging to the United States. Certain instructions of the General Land Office were then offered, which, it is contended by appellee, directed said petitioner to seize any timber he believed to have been cut from government land, even in the hands of other persons claiming ownership, against their protest, and to brand the same with the letters "U. S.," unless the seizure was resisted or caused a breach of the peace. This testimony was admitted over the objection of appellants. And these rules and regulations go on to stipulate what shall be done with the timber so seized.

There is nothing in the testimony to prove that Schlierholz acted under these instructions in seizing the timber of the Hamiltons and Keener. But the agreement shows that the timber seized and branded, for which acts these indictments were found, was at the time in the possession of the persons whose names appear as witnesses on the indictments (that is, the said C. W.

Hamilton, J. M. Hamilton, and W. J. Keener, see Record, pp. 7 and 8), and was seized by the said Schlierholz while he was acting as such special agent of the General Land Office over and notwithstanding their protest, they at the time claiming ownership of the said timber; that at the time the said seizures were made the said Schlierholz believed that the said timber had been cut from the public domain, etc.

"That at the time said seizures were made and the timber branded he had no writ or process from any court, but acted with no authority other than the rules of the General Land Office of the United States" (id., 10, 11).

The district court released and discharged the said petitioner from custody (id., 9), overruling the objections to the admissibility of the rules and regulations of the General Land Office offered in evidence (id., 11).

At the request of the appellants the court below certified to this court the question of jurisdiction of said court to release and discharge the prisoner, and the propriety of the order and judgment of the said court in so releasing and discharging him (id., 13).

And the appellants filed an assignment of errors which, in addition to the question of jurisdiction, presents other points (id., 12).

I.

Upon an appeal from the Circuit Court of the United States in a case of *habeas corpus*, all questions of law or of fact, arising upon the record, including the evidence, are open to consideration; and the circuit court has no authority to make con-

clusive findings of fact, as it might do in actions at law upon waiver of a jury, or in cases of admiralty.

Johnson *v.* Sayre, 158 U. S., 109, 115, 116.

Citing

Ralli *v.* Troop, 157 U. S., 386, 417.
In re Neagle, 135 U. S., 1, 42.
Bond *v.* Dustin, 112 U. S., 604.

And this cause was appealable even though the petition was addressed to, and the issuance of the writ ordered by, the district judge, since the proceedings and final order were all made the action of the court.

Harkrader *v.* Wadley, 172 U. S., 148, 162.

In this case the assignment of errors presents the question of jurisdiction, and also questions bearing upon the constitutionality of the proceedings of the special agent, if it should be held that he was acting within the proper orders of the General Land Office.

Where this court has acquired jurisdiction of a cause by a general appeal, and the question of constitutionality is involved, it will consider that question, as well as all others in the record, even though the question of jurisdiction had not been properly certified to it.

Chappell *v.* United States, 160 U. S., 499, 509.

II.

A. This cause coming here for a general review of the law and the facts, we present the questions involved in the record in the order stated in the assignment of errors (Record, p. 12).

Did the court below have jurisdiction to release and discharge the appellee from the custody of the sheriff of Independence County?

The law of the State of Arkansas, at the time the appellee seized the timber of C. W. Hamilton, J. M. Hamilton, and W. J. Keener, was contained, among other things, in sections 6140, 6142, and 6144, of Sandels & Hill's Digest of the laws of the State. These sections read as follows:

"Section 6140. No person other than the owner thereof, or his agent, shall take possession, drive, run, or in any way dispose of any log, spile, railroad tie, or other timber, shingles or lumber floating upon, lying, or being in any river or other waters in this State, or any boom therein, or on the shore or banks thereof.

"Sec. 6142. No person other than the owner or his agent shall make or place, or cause to be made or placed, any mark upon any log, railroad tie, or other timber, or lumber upon or in any river or other waters in this State, or in any boom therein, or on, or near the banks or shores thereof.

"Sec. 6144. Any person violating any of the four preceding sections shall be deemed guilty of a misdemeanor, and on conviction, punished by a fine not exceeding $1,000, or by imprisonment in the county jail not exceeding six months, or both such fine and imprisonment."

This law, enacted by the State, did not require, as an incident to the commission of the offenses aimed at, that they should be accompanied by force or be attended by breaches of the peace. The law aiming to prevent the commission of offenses that were most frequently done when the owner's back was turned, and he was distant from the scene of action, undertook to meet an evil that required just such a remedy. Without discussing the fact that at common law trespasses of the nature mentioned in these

sections were regarded with strong disapproval, and justified, in any event, the resort to the civil remedy, it cannot admit of serious controversy that it was within the province of the State to do away with the idea that force or a breach of the peace was an essential ingredient to the conversion of such acts of wrongdoing into penal offenses.

If it is within the province of the State to create a new penal offense by requiring the master of a vessel arriving from a foreign port to report to the mayor or recorder of a city an account of its passengers; or if it can prohibit the manufacture or sale of liquor previously authorized; or can seriously affect the manufacture and sale of oleomargarine previously authorized, upon what principle can the State be denied the right to convert certain classes of trespasses, of specially objectionable character, into crimes? See

Mayor of New York *v.* Miln, 11 Peters, 102.
Mugler *v.* Kansas, 123 U. S., 623.
Kidd *v.* Pearson, 128 U. S., 1.
Powell *v.* Pennsylvania, 127 U. S., 678.
Lawton *v.* Steele, 152 U. S., 133, 136 *et seq.*

With this law in force, the appellee, without process of any kind, upon his own unsupported judgment, in the guise of a special agent of the United States government, took it upon himself to seize certain timber claimed by and in the possession of C. W. Hamilton, and other individuals, and to mark it "U. S." against the protest of the owners.

It is unnecessary to say that such a course of conduct would not have been tolerated if an individual had been acting in his own behalf. If Schlierholz had acted in this manner in his own behalf he would have been a rank trespasser, and would have

been clearly amenable to the law of Arkansas above mentioned. And he would not have had any standing in a Federal court to air his grievance by *habeas corpus*, even though he had come from some other State in which he had citizenship.

What difference did it make that he was a special agent of the Land Office for proper purposes? The very fact that he was an officer of the government rendered his duty all the greater to exercise his powers cautiously and discreetly. What was not permissible to an individual was not permissible to him as special agent. He was not invested with authority to take away the timber in the possession of third persons, upon his own unsupported belief that it had been cut from the public domain. The appellee, fancying that the fact of his special agency gave him world-wide discretion and power, took it upon himself to do that which must shock the sense of propriety of every law-abiding citizen; that is, he took it upon himself to settle the question of right at once, without notice or a hearing to the apparent owners, by seizing the timber of the two Hamiltons and Keener, against their protests. It is no excuse for him, I submit, to say that he was justified in this because the apparent owners did not shoot him down or club him into insensibility to prevent him from making this seizure. That would not have increased the gravity of his wrongdoing. It might have excited sympathy for him. See

Handford *v.* United States, 92 Fed. Rep., 881.

In the case of Handford *v.* United States, the Court of Appeals for the Eighth Circuit passed upon the acts of this very same officer, committed in the same county, as appears in the record in this cause. It was there said, among other things:

"The title of the government to the logs grown on the land of an individual, and purchased by it, is precisely the same that it is to logs grown on its own land; and if one should wrongfully take the logs of the government, purchased from the owner on whose land they grew, or wrongfully cut and remove logs from the land of the government, the remedy in either case is by an action of trespass or replevin. The case is not different in its legal aspects from what it would have been if the government agent had gone into the private residence of the plaintiffs in error and seized and carried off their furniture on the claim that it was made out of timber cut on government land, for the timber at all stages of the conversion remains the property of the owner. Woodenware Co. *v.* U. S., 106 U. S., 432. The right to seize, and the legal consequences of the seizure, would be the same. There is no higher or different right to seize logs cut from government land under existing laws than there is to seize any other kind of personal property which it is claimed the government owns."

And it was said that the government had no other or further right of seizure than would have been the case with a private individual.

In that case the question arose in a proceeding *in rem* brought in the lower court by the government to condemn and sell several rafts of logs that had been seized by the said agent while in the hands of C. R. Handford & Bro., and it was decided that the seizure gave no right, and that the proceeding could not be maintained.

The mere fact that a party is a special agent of the government does not exempt him from the jurisdiction of State laws any more than a State officer would, as such, be exempt from the jurisdiction of the Federal courts, on this account, in a suit for wrong done.

Buck *v.* Colbath, 3 Wall., 334, 342.
U. S. *v.* Kirby, 7 Wall., 482.

Virginia *v.* Paul, 148 U. S., 107.
The Monte Allegre, 9 Wheat., 616, 645.
Slocum *v.* Maberry, 2 Wheat., 1.
McKee *v.* Raines, 10 Wall., 22, 25.
Hagood *v.* Southern, 117 U. S., 52.
Poindexter *v.* Greenhow, 114 U. S., 270.
Hathcote *v.* State, 55 Ark., 181.
Vanderpool *v.* State, 34 Ark., 174.
Harkrader *v.* Wadley, 172 U. S., 148, 163 *et seq.*

In Buck *v.* Colbath, *supra*, the question at issue was whether a marshal of the United States would be protected against a suit for damages at the instance of a third person for goods levied upon under a general attachment. And it was held that he would be suable in the State court, and that his capacity as marshal would not protect him in that case.

That is also the effect of the decision in the case of McKee *v.* Raines, *supra*, the court there saying:

"No act of Congress has been cited from which authority can be derived to the marshal of any court of the United States to seize the goods of one person for the satisfaction of the debts of another" (10 Wall., 25).

In the case of Slocum *v.* Maberry, *supra*, the question arose as to what would be a proper course of procedure if a seizure in admiralty were adjudged to be wrongful. In that case the proper remedy for damages against the officer was held to lie only in the State court (2 Wheat., 10).

In the proceeding against the Monte Allegre, *supra*, a question of liability of the marshal of the United States, for failure of title at a sale made by him through an auctioneer, arose. While it was held that the marshal in his official capacity had no authority to bind himself by a warranty, it was said:

"If he steps out of his official duty, and does what the law gives him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress" (9 Wheat., 645).

In Virginia *v.* Paul, *supra*, the effect of the decision was to render a Deputy United States Marshal amenable to the State court under a charge of murder; and in that case it was contended by the deputy marshal that the offense he stood charged with had been done by him while acting in the performance of his duty as a deputy marshal.

In Hagood *v.* Southern, *supra*, and Poindexter *v.* Greenhow, *supra*, State officers were held to be liable for acts done by them, at the suits of individuals, in the Federal courts, because they had done acts not authorized by law, or had acted under unconstitutional enactments (117 U. S., 70; 114 U. S., 287).

In Hathcote *v.* State, *supra*, a mail carrier was held amenable to a criminal law of the State against carrying concealed weapons. And in Vanderpool *v.* The State, *supra*, a commissioner of a circuit court of the United States was held to be liable to a State criminal law against false imprisonment, because he fined and imprisoned a party when he had no authority of Congress to do so.

In the last cited case it was said, quoting Cooley on Torts, 416, and citing other cases, that when the commissioner so acted, he stepped "over the boundary of his judicial authority, and is as much out of the protection of the law, in respect to the particular act, as if he held no office at all" (34 Ark., 177).

It is noteworthy in these cases that the doctrines announced were most frequently applied so as to leave a ministerial or other

officer liable for acts done in pursuance of some supposed judicial authority. (See further, Wise *v.* Withers, 3 Cr., 331; Dynes *v.* Hoover, 20 How., 65.) But that is far from being the case with the petitioner. He had not, at the time he was acting, any writ or process issued with or without authority, or which did or did not grant power to do what he attempted to do. The appellee acted without writ, process, or congressional enactment. He, indeed, speaks of rules and regulations of the General Land Office, and these are offered and admitted in evidence, but it nowhere appears by any positive statement that he acted under these instructions. In fact those rules and regulations were never calculated to give him the large license and power he exercised, because they provided that he should only make seizure "provided that the party in possession of same does not resist such seizure or same does not cause a breach of the peace" (Record, 10). Now these words imply that there is a distinction between resistance to the seizure and a breach of the peace upon the attempt to make the seizure. Evidently the resistance that was contemplated was not such as involved a breach of the peace. And if a protest was not adequate evidence of such resistance, it would be difficult to conceive what kind of resistance was contemplated unless it was accomplished by a breach of the peace. It is therefore clear that even under the directions he received, the appellee was not authorized to make a seizure against the protest of the owners or parties in possession.

It is common learning that a trespass *vi et armis* is committed when the real property of a person is entered upon without his consent, and that a similar trespass occurs respecting

personal property when the property is taken without or against the possessor's consent.

Cooley, Torts (Ed. 1880), 322, 438.
Chitty, Pleadings, Vol. 1, 192*.

An entering upon property without the consent of the possessor, however peaceable it may be, is a forcible entry.

Croff *v.* Ballinger, 18 Ill., 200.

And good intent or belief of one's right to do such things does not excuse the acts.

Mitchell *v.* Harmony, 13 How., 115, 135.
Bishop, Noncontract Law, sec. 499.

Nor does the illegal order of a superior officer justify such acts.

Little *v.* Barreme, 2 Cr., 170.
Mitchell *v.* Harmony, 13 How., 115, 137.
Bates *v.* Clark, 95 U. S., 204.
Ex Parte Milligan, 4 Wall., 2.
Reichardt *v.* Felps, 6 Wall., 160.
Noble *v.* Union River, Etc., Co., 147 U. S., 165.
United States *v.* Pine River Logging, Etc., Co., 89 Fed. Rep., 907, 917.
Johnson *v.* Jones, 44 Ill., 142, 159.

But there is an allegation in the petition, in its very first paragraph, which throws light upon the extent and meaning of the extracts from the printed instructions which petitioner introduced in evidence. It reads as follows: "That as such special agent he was directed by his superior officer, the Honorable Commissioner of the General Land Office of the United States, to go to the State of Arkansas and seize any timber unlawfully cut from the lands of the United States on the property of the United States" (Record, 1). In other words, the instruc-

tions were that where the agent found timber which appeared to have been cut off of the government domain, lying upon government land, he was to seize it, if such seizure could be made without resistance or without a breach of the peace. That would appear to be more in conformity with the attitude of the government and its departments, and not invest the agents (not infrequently indiscreet and arbitrary persons), with an undue and unseemly amount of power and discretion, and would be in conformity with the views of this honorable court, as announced in Wells *v.* Nickles, 104 U. S., 444, and *In re* Neagle, 135 U. S., 1, 65.

The preceding argument, under this head, I respectfully submit, may be summed up as follows:

That under the statutory law of Arkansas making it a misdemeanor to do such things, and under the common law making it unlawful to perpetrate such acts, the appellee, without authority of act of Congress or any legal authority of any court or officer, took from certain citizens and residents of the State, in the county of Independence, their timber and appropriated it. That he had no immunity from the law of the State because of the fact that he was a special agent of the government, and was as much amenable to its process as any other lawbreaker in the State would be.

Ex Parte Crouch, 112 U. S., 178, 180.

It follows that the lower court should have refused to release and discharge the appellee from the custody of the State court.

If the action of the lower court is sustained, we will have this result:

That the petitioner will have, without a hearing to the owners of the timber, deprived them of their property; and will have deprived the State of the power of protecting its subjects; and the law of the State providing for the regular and orderly method of trying its offenders will be set at naught; and the judgment of a Federal district court or judge will be of higher character than the State tribunals, even though no act of Congress or legal order of any department of the Federal government can be shown to sustain the action of the offender.

Not only do the cases already cited show that in order to invoke the protection of the Federal courts must the officer have acted under a legal act of Congress, order of a department, or judgment or order of a court, as to the very thing or act done, but repeated announcements of this court in *habeas corpus* cases proceed upon that theory, and none other.

Thus, in Tennessee *v.* Davis, 100 U. S., 257, 263, it was only claimed that removal of a case against a Federal officer could be had from the State to the Federal court, if the Federal officer was acting under a Federal law, "and within the scope of his authority" (100 U. S., 263). And this language was repeated in the Neagle case (*In re* Neagle, 134 U. S., 61, 62).

In fact, as is clearly indicated in the reasoning of this court, in the cases which came before it, the Federal jurisdiction, whether exercised by Congress, by the executive, or by the courts, is limited to the authority these possess, and an officer can go no further; and if he does, acts upon his personal responsibility, and is subject to the laws of the proper jurisdiction which relate to his extraofficial acts.

B. Having presented the matters embraced in the first and ond assignments of error, I beg leave to now present the sug- stions covered by the third, fourth, and fifth assignments of ror.

The last paragraph of the last preceding subdivision may made the basis of a more detailed presentation. It relates to e demarcation lines of jurisdictional power.

Our third, fourth, and fifth assignments of error present nstitutional questions. Of course, I know that this court does t quickly take up and decide such questions. And yet, if the cision of the lower court is to be made effective, the provisions the fourth, fifth, and eleventh amendments to the Constitu- on will have to be ignored. For under that decision not only s an unreasonable seizure been sanctioned, but it has been sanc- oned without giving the parties affected an opportunity to be eard, and the State has been deprived of the power to protect s citizens against arbitrary and unreasonable seizures and tres- asses.

Unreasonable seizures are surely those which are made ithout giving the party in whose possession the property seized , and who is claiming ownership thereof, an opportunity to be eard in defense of his own rights. Indeed, before any citizen ould be deprived of his property, a property which was in his ossession and to all appearances his, something more than a mere eneral order of a department, some process in a replevin or a milar process from a competent court, would have to be own. And if a person should do such an illegal act, irectly forbidden by the fourth amendment and dis-

countenanced by the fifth amendment, what possible ground could there be for saying that his act of wrongdoing could not be punished by the State wherein it was done, if its laws prohibited the same? To justify the decision of the lower court it is necessary to hold that although an officer of the United States is not acting within his authority, but is doing a wrong that is within the prohibition of the United States Constitution, and so could not be sanctioned by Congress, by the executive, or by the directions of a court, and is without the pale of the jurisdiction and power of the United States, yet that the State is powerless to deal with him for a crime he has committed against its laws.

What are unreasonable seizures, within the meaning of the fourth amendment, was fully discussed in the great case of Boyd *v.* United States, 116 U. S., 616. Therein it was shown that property of all kinds, including books and papers, and even alleged smuggled goods, was sacred against arbitrary seizure on the part of any governmental officer. If a general warrant had been issued by the commissioner of the General Land Office directing the appellee to arrest any person by him believed to be guilty of timber cutting, under a general John Doe warrant, and to seize the property so believed by him to be cut, it would be promptly held by this court that this was unconstitutional and void.

West *v.* Cabell, 153 U. S., 78.
Mead *v.* Haws, 7 Cowen, 332.
Comm. *v.* Crotty, 10 Allen, 403.
Scott *v.* Ely, 4 Wend., 555.
Grammon *v.* Raymond, 1 Conn., 40.
Haskins *v.* Young, 2 Dev. & Bat. (N. C.), 529.

See also

Boyd *v.* United States, 116 U. S., 616, 624-626.

And yet here there is not even that much to sustain this unreasonable seizure. Here there is nothing to sustain the extravagant pretension of the appellee except general instructions which, taking the most favorable view for him, are of uncertain quantity and meaning, and too general for specific application.

Then regarding the fifth amendment, wherein the right to be heard before property is seized and taken away is explicitly stated. It is hardly necessary to cite the long line of cases upon the meaning of "due process of law." It will suffice to cite Hovey *v.* Elliott, 167 U. S., 409, and R. R. Co. *v.* Chicago, 166 U. S., 226. In the first of these cases the judgment of a court against a contumacious party who would not obey its proper decree to turn back money into its registry which he had improperly received, was held to be void, even against collateral attack, because the court had, as a measure of punishment for the party's contumacy, stricken his answer and testimony from the files and records of the court, and then rendered judgment against him. In the other it was decided that an improper taking of property, without due process of law, might occur, even though a trial by jury had been accorded, if such things were done in connection with the trial by the court as practically deprived the owner of the opportunity of having a fair and proper hearing.

We need not urge the point that here no intervention of a court was invoked by the appellee to give some semblance of propriety to his arbitrary acts.

It is believed to be unnecessary to cite further cases or authority to show that nothing in this case existed which deprived the State of Arkansas of the right to deal with appellee under the process of its Independence Circuit Court.

C. The sixth assignment of error presents the question whether it was in any event proper in this proceeding, by the decision of a district judge (for it might have been by the judge merely), or by a district court, to take away from the Circuit Court of Independence County, Ark., the right to try the petitioner, on indictments duly found, without providing a remedy whereby the petitioner might be made answerable for a disregard of its laws, he at the same time not being in the legal discharge of any duty upon legal warrant duly issued under any act of Congress.

Assume, if it please the court, for the sake of argument, that in a way the petitioner was acting in the discharge of duty as a governmental officer, within the "scope of his authority," what was the proper and correct course under the circumstances?

Sections 641, 642, and 643 of the Revised Statutes provide that in cases in which persons are denied equal rights under the civil-rights laws, and in prosecutions in State courts against revenue officers and officers acting under registration laws pertaining to Federal elections, removals to Federal courts may be had by the process of *habeas corpus cum causa*. These sections have been held to be mandatory as far as the procedural requirements therein mentioned are concerned; and a failure to comply with such requirements deprives the Federal courts of jurisdiction to hear and determine such causes. See

Virginia *v.* Paul, 148 U. S., 107.

There was no law of Congress under which the petitioner could remove the cases against him by *habeas corpus cum causa* into the Federal courts. He was not within the classes who

needed the immediate intervention of the Federal courts, for his protection, so as to deprive the State courts of the power, in the first instance, of trying offenses alleged to have been committed against the State. The enactment of these sections by the process of exclusion pointed out the fact that Congress did not contemplate depriving State courts of the right to try timber agents of the United States, even though the offenses charged against them were within the scope of their authority as such agents. No doubt this honorable court has felt the embarrassment attendant upon removal of indictments from State to Federal courts. But it could not have been the intention that any State causes whatever could be removed to Federal courts, or be even brought before district judges where some government agent claimed governmental protection, under the shorter process of *habeas corpus*, simply because *habeas corpus cum causa* was a cumbersome process, and attended with embarrassments. If that had been the intention, then the sections mentioned were wholly unnecessary, in fact were an absurdity, for they added so much detail and hard work in the administration of such cases that if *habeas corpus* accomplished everything they might well be regarded as absurd or ridiculous in character. That, however, has not been judged to be the case. The sections referred to are sensible, and meet a real need.

But they demonstrate that it is not proper to take away from State courts the power to try offenses by indictments, or other regular process, by the issuance of writs by Federal judges, unless some similar method of inquiry to that given by State law is accorded the State sovereignty, so that its sovereign rights may

be as much protected as the alleged or pretended rights of the government officer. And they further demonstrate that unless an express law gives a method by which such causes can be removed by *habeas corpus cum causa*, whereby the proceedings in the State courts may go to Federal courts, to be tried regularly on the indictments or informations which were found in the State courts, they should not be removed for the protection of an officer who is not within the purview of section 642.

In line with this reasoning are the utterances of this court. Although prior to that time Federal *nisi prius* judges had taken from State courts of the highest character, causes pending before them, where constitutional questions were involved under the Constitution of the United States, by the decision of this court in the case of Robb *v.* Connelly, 111 U. S., 624, it was settled that the State courts had the right to decide such questions in the first instance, and that it was improper to take this right away by the summary process of *habeas corpus*, in the manner referred to.

And since this case was decided, repeated decisions have been announced here which carry the doctrine further, and hold that it is most proper in all cases, except perhaps where judicial officers have acted in discharge of the judicial requirements of Federal tribunals, or in some other very pressing and plain case, to allow the State courts to proceed with causes properly before them, leaving the aggrieved party to his final appeal to this court, if his rights under any act of Congress shall be disregarded.

Baker *v.* Grice, 169 U. S., 284.
Whitten *v.* Tomlinson, 160 U. S., 231.
Pepke *v.* Cronin, 155 U. S., 100.
New York *v.* Eno, 155 U. S., 89.

Ex Parte Frederick, 149 U. S., 70.
Cook *v.* Hart, 146 U. S., 183.
In re Wood, 140 U. S., 278.

And it has been decided that the writ of *habeas corpus* cannot be used to obstruct the ordinary administration of the criminal laws of the State.

In re Wood, 140 U. S., 278, 289.
McElvaine *v.* Brush, 142 U. S., 155, 160.
Bergeman *v.* Baker, 157 U. S., 655.

The argument under this subdivision must be tested by what could and does occur where district or circuit judges decide *habeas corpus* cases releasing persons held under State process. In such cases no appeal lies to any court. The right of appeal which previously lay in *habeas corpus* cases from the decision of a district judge to the circuit court, was taken away by the act which created the court of appeals. But this act did not give appeals from the decisions of district or circuit judges to either that or to this court. And so the decisions of these judges under *habeas corpus*, where unfavorable to State action, will operate as final writs of prohibition to all State courts, even the supreme courts of the States. It is apparent that under these circumstances the doctrine I contend for is best calculated to do justice to the State. Indeed, the taking away by one jurisdiction of the right to try cases in another jurisdiction is so anomalous and extraordinary that it would seem it ought not to be done except in the way pointed out by act of Congress, by removal or by appeal. But where, under the decisions of this court, it is permitted, without positive enactment of Congress, it should be confined to cases of the most urgent character. This, I take it,

is cases where judicial officers are acting in pursuance of the judicial requirements of the courts of the United States, or other very exceptional cases. In any ordinary case the danger of oppression to a governmental officer by the courts of a State, in times of peace, is too remote, and is of much less importance than the extraordinary act of depriving the State of a jurisdiction, legitimately claimed, especially where, as in this proceeding, the party has the right to give bail bond, and afterwards appeal to this court to be fully protected.

It is true appellee complains in his petition that the indictments were found at the instance of others who are trying to embarrass him in the discharge of his duty. But as there is no evidence in the record to sustain that allegation, it will hardly be accepted as true. It will rather be presumed that the grand jury which returned the indictments did their duty by returning them without bias or prejudice.

D. The seventh and last assignment of error relates to the introduction of certain rules, regulations and instructions of the General Land Office. These, as already claimed, were wrongly admitted in evidence. If they authorized or countenanced an illegal seizure they were of no effect.

Little *v.* Barreme, 2 Cr., 170.
Mitchell *v.* Harmony, 13 How., 115, 137.
Bates *v.* Clark, 95 U. S., 204.

If they authorized unconstitutional acts they were ineffective.

Ex Parte Milligan, 4 Wall., 2.
Reichardt *v.* Felps, 6 Wall., 160.
Noble *v.* Union River, Etc., Co., 147 U. S., 165.

United States *v.* Pine River Logging, Etc., Co., 89 Fed. Rep., 907, 917.
Johnson *v.* Jones, 44 Ill., 142, 159.

If they did not, when fairly construed, authorize the doing of the illegal acts of the petitioner they were equally immaterial for him.

So that from any standpoint they were inadmissible. It could not be claimed that these rules, regulations and instructions were equal in force to an act of Congress, or the writ or order of a proper court, within the exercise of its jurisdiction.

United States *v.* Eaton, 144 U. S., 677, 687, 688.

But even if they were equivalent to an order of court, they would be as void, for vagueness and generality, as any general warrant would be authorizing the caption of anybody or anything within the provision of any penal law.

CONCLUSION.

In view of what has been said in this brief, it is contended that the order discharging the petitioner was beyond the jurisdiction of the lower court, was in disregard of the Constitution of the United States, and was otherwise improper and unjustifiable, and it is now submitted that by the decree of this court the right and power of the State of Arkansas to deal with the petitioner, through its courts, should be recognized and enforced.

Very respectfully,

MORRIS M. COHN,
Attorney for Appellants.

JEFF DAVIS,
Attorney General.

S. D. CAMPBELL,
District Attorney.

J. C. YANCEY, Esq.,
Of Counsel.

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No. 122.

Office Supreme Court U.S.
FILED
DEC 4 1900
JAMES H. MCKENNEY,

Brf. of Atty. Gen'l (Ark.) for Appellee.

Filed Dec. 4, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE STATE OF ARKANSAS AND JOHN A. Hinkle, as sheriff of Independence County, Arkansas, appellants,
v.
CHARLES A. M. SCHLIERHOLZ, APPELLEE.

No. 122.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE STATE OF ARKANSAS AND JOHN A. HINKLE, as sheriff of Independence County, Arkansas, appellants, *v.* CHARLES A. M. SCHLIERHOLZ, APPELLEE. } No. 122.

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from the judgment of the district court of the United States for the eastern district of Arkansas, rendered in a habeas corpus proceeding, discharging the appellee from the custody of the sheriff of Independence County, Ark. Schlierholz, the appellee, a special agent of the General Land Office of the United States, was sent by his superior to Arkansas to investigate and suppress timber depredations on the public lands. In the discharge of his duty, acting under instructions, he

seized and branded with the letters "U. S." certain timber in rafts on the White River, in Independence County, Ark., which he believed had been unlawfully cut from land of the United States. For this he was indicted by the local State court in two indictments, one charging him with unlawfully seizing, and the other with unlawfully branding, the timber, in violation of the Arkansas statute. Taken into custody by the sheriff, Schlierholz applied to the United States district judge for a writ of habeas corpus, alleging that he had seized and branded the timber as a special agent of the General Land Office in the discharge of his duty as such, and under instructions from his superior. The writ was issued, the sheriff made return of the warrants under the State indictments as his authority for holding Schlierholz, while the prosecuting attorney, on behalf of the State of Arkansas, filed a response alleging that Schlierholz, in seizing and branding the timber, misconceived his duties as special agent and acted outside of his instructions and contrary to the laws of the United States and the rules of any Department thereof (R., p. 5).

The case was heard in the district court of the United States, and the following judgment discharging Schlierholz from the custody of the sheriff was rendered (R., p. 9):

> Now, on this day, comes John A. Hinkle, sheriff of Independence County, and on his motion this cause is ordered to be transferred to the district court of the United States for the northern division of the eastern district of Arkansas; and thereupon came said sheriff and State of Arkansas, by S. D. Campbell, esq., State's attorney, and file a response to the petition herein; and thereupon this cause

came on for hearing, both parties being ready, and the court, having heard the evidence, finds that the said petitioner, Charles A. M. Schlierholz, *was in the performance of his duties as a special agent of the General Land Office of the United States, and the actions charged in the said indictments set out in the response were performed by him as such officer and in strict conformity with the rules and regulations of the Secretary of the Interior of the United States*, and that his detention and arrest by the sheriff of Independence County, State of Arkansas, was illegal and void.

It is therefore ordered and adjudged by the court that the said Charles A. M. Schlierholz be discharged from the custody of said sheriff under the writ in the petition and response set out and go hence without day.

And at the request of the attorney for the State thirty days' time is granted for a bill of exceptions.

The bill of exceptions contains the following agreed statement of facts (R., pp. 10 and 11):

The petitioner was indicted by the grand jury of the Independence County circuit court at the spring term, 1899, in two cases, two copies of which are filed with the response of the sheriff and the State; that the petitioner, Charles A. M. Schlierholz, at the time he made the seizures and branded the same with the brand of the United States, *was a special agent of the General Land Office* of the United States, duly commissioned as prescribed by law; that he is a resident and citizen of the State of Missouri, and was sent to the State of Arkansas by his superior officer, the Commissioner of the General Land Office, with instructions and directions to investigate certain alleged trespasses

committed in the State of Arkansas on the public domain by parties cutting unlawfully timber from lands belonging to the United States; that he had instructions which were furnished him by the Department of the Interior and which had been prepared by the Commissioner of the General Land Office and approved by the Secretary of the Interior of the United States, which were the following:

"That any special agent is directed *to seize any timber cut and taken away from the lands of the United States* wherever it may be found and — whosoever possession it may be found. That whenever any special agent finds any timber in the possession of any person which *he is satisfied from an investigation made by him has been unlawfully cut from the lands of the United States he shall seize the same* from any person in the possession of the same wheresoever found *and brand the same as the property of the United States with the brand 'U. S.,' provided that the party in possession of the same does not resist such seizure* or same does not cause a breach of the peace, but if the party in whose possession it is resists such seizure or it is likely to cause a breach of the peace he shall cause the attorney of the United States for the district to institute legal proceedings for the seizure or recovery of such timber, and any timber thus seized by the Land Department, through its officers or special agents, may be disposed of by that Department in such manner as it may determine."

That the Department furnished to the said Schlierholz a branding iron with the letters "U. S." on it; that the timber seized and branded, for which acts these indictments were found, was at the time in the possession of the persons whose names are indorsed as witnesses on the indictments and was seized by the said Schlierholz

while he was acting as such special agent of the General Land Office *without resistance on the part of the persons in whose possession he found it,* but was seized over and notwithstanding their protest, they at the time claiming ownership of the said timber; *that at the time the said seizures were made the said Schlierholz believed that the said timber had been unlawfully cut from the public domain; that he reported the seizures immediately to the General Land Office, and his actions were approved by the Commissioner.*

That at the time said seizures were made and the timber branded he had no writ or process from any court, but acted with no authority other than the directions and rules and regulations of the General Land Office of the United States, as hereinbefore recited.

The respondent Hinkle had the prisoner in his custody by virtue of the warrants issued by the clerk of the Independence County circuit court, Arkansas, copies of which are filed with the petition, and that said warrants were in due form of law and based on the two indictments filed with the response.

JACOB TRIEBER,
U. S. Attorney, for petitioner.
S. D. CAMPBELL,
Att'y for Respondents.

And to that part of the above statement of facts relating to the rules and regulations furnished said Schlierholz by the Commissioner of the General Land Office and the instructions and directions from said Commissioner and Department, and also to that part relating to the furnishing of the branding iron with the letters "U. S." to said Schlierholz, the respondents, State of Arkansas and Hinkle, by their attorney, on the ground that such evidence

was immaterial and irrelevant, at the time objected, and, their objections being overruled, they duly excepted thereto, which exceptions are noted of record.

The State of Arkansas and the sheriff having appealed and filed an assignment of error (R., p. 12), at their request the following questions were certified to this court (R., p. 13):

1. Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence County, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.

2. Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence County, Arkansas, to be dealt with by the Independence circuit court of the State, or to discharge him from said custody.

Aside from the question of jurisdiction, which I shall first discuss, obviously the points to be considered are:

1. Was Schlierholz acting in the discharge of his duty as special agent when he seized and branded the timber?

2. If so, was the district court of the United States right in interfering to prevent his trial under indictments by a State court for acts thus done in the discharge of his duty as a United States officer?

BRIEF.

I.

JURISDICTION.

The case is here on appeal from the judgment of the district court of the United States discharging the petitioner. The orderly course in cases of this character is to go to the circuit court of appeals on the merits of the case, in which court the decision is final unless reviewed by this court on certiorari. To give this court jurisdiction the present case must be one within section 5 of the circuit court of appeals act. If jurisdiction exists, an examination of the assignment of errors shows it must be under one of the following clauses of that section:

> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
>
> In any case that involves the construction or application of the Constitution of the United States; in any case in which the Constitution or any law of the United States * * * is drawn in question.
>
> In any case in which the Constitution or law of the State is claimed to be in contravention of the Constitution of the United States.

Is, then, the jurisdiction of the court below in issue, or is there a constitutional question properly involved?

1. Neither prior thereto, nor in the return to the writ, nor in the response of the State of Arkansas was there any objection made to the jurisdiction of the court. The pleading of the State admitted the jurisdiction of the

court below to proceed with the case. The defense was on the merits and based entirely on the ground that the petitioner misconceived his duties and acted outside of his instructions and contrary to law. No objection having been made to its jurisdiction, of course such question was not entertained by the court nor passed upon by it. After judgment, and at the request of the appellants, the following questions were certified to this court (R., p. 13):

> (1) Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle, sheriff of Independence County, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.
>
> (2) Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence County, Arkansas, to be dealt with by the Independence circuit court of the State, or to discharge him from said custody.

This is not a certification of the question of jurisdiction contemplated by section 5 of the Circuit Court of Appeals act. There is no certification of the "question of jurisdiction alone." The right of the lower court, as a matter of law, to entertain the case at all is not disputed, but rather the question is raised whether the court in its judgment properly decided the case. In *Chappell* v. *United States* (160 U. S., 507), this court said:

> In order to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court.

The appellants chose to go to hearing upon the merits of the case after having admitted by the pleadings the jurisdiction of the court to proceed. There is no question as to the right of a court of the United States under sections 751 and 753 of the Revised Statutes to issue a writ of habeas corpus upon petition of an officer of the United States held in custody because of the performance of his official duties. While, of course, this court may at any stage notice a plain error of law, whether assigned or not, it is submitted that there is no question in the present case as to the jurisdiction of the lower court, and that appellants have waived their right to come here on that question alone.

2. It is submitted also that there is not before this court any constitutional question. No such question was raised in the lower court nor passed upon by it. In the assignment of errors the so-called constitutional questions were raised for the first time.

The Chief Justice, speaking for the court in *Ansbro* v. *United States* (159 U. S., 695, 697), said:

> The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case "that involves the construction or application of the Constitution of the United States," or "in which the constitutionality of any law of the United States is drawn in question." But we can not find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or

the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. (*Borgemeyer* v. *Idler*, 159 U. S., 408; *Carey* v. *Railway Company*, 150 U. S., 170; *In re Lennon*, 150 U. S., 395; *Northern Pacific Railroad Company* v. *Amato*, 144 U. S., 465, 472; *Sayward* v. *Denny*, 158 U. S., 180.) An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891.

See also *Cornell* v. *Green*, 163 U. S., 79; *Muse* v. *Arlington Hotel Company*, 168 U. S., 435; *Carey* v. *Houston and Texas Central Railway*, 150 U. S., 170, 181.

No definite issue was made in this case nor question raised as to the application of the Constitution or claim made that any provision thereof had been violated by petitioner, and no such point was decided by the court. It is submitted, therefore, that no constitutional question

having been presented to or passed upon by the court below, such question can not now be raised after judgment in order to vest this court with jurisdiction.

II.

SCHLIERHOLZ WAS IN THE DISCHARGE OF HIS DUTY.

Coming to the merits, the primary question is whether Schlierholz was acting in the discharge of his duty as special agent of the General Land Office of the United States when he seized and branded the timber. In his application for the writ he alleged he was (R., p. 1). The State of Arkansas denied this, insisting he had misconceived his duty and acted outside of his instructions and contrary to the laws of the United States (R., p. 5). The lower court, after hearing on evidence, found that he—

> was in the performance of his duties as a special agent of the General Land Office of the United States, and the actions charged in the said indictments set out in the response were performed by him as such officer and in strict conformity with the rules and regulations of the Secretary of the Interior of the United States (R., p. 9).

The agreed statement of facts concedes that at the time Schlierholz made the seizures and branded the timber with the brand of the United States he was a special agent of the General Land Office and was sent to Arkansas by the Commissioner of the General Land Office, with instructions and directions to investigate certain timber depredations; that among the instructions furnished him by the Commissioner of the General Land

Office and approved by the Secretary of the Interior were the following:

> That any special agent is directed to seize any timber cut and taken away from the lands of the United States wherever it may be found and in whosesoever possession it may be found.
>
> That whenever any special agent finds any timber in the possession of any person which he is satisfied from an investigation made by him has been unlawfully cut from the lands of the United States he shall seize the same from any person in the possession of the same wheresoever found and brand the same as the property of the United States with the brand "U. S.," provided that the party in possession of the same does not resist such seizure or same does not cause a breach of the peace.

The court will observe that these instructions make it the sworn duty of the special agent to seize any timber which he is satisfied has been unlawfully cut from the lands of the United States, and to brand the same with the brand "U. S.," provided the party in possession of the timber does not resist the seizure, and the same does not cause a breach of the peace. If resistance is made and a breach of the peace threatened, then it is the duty of the special agent to call upon the United States attorney to institute legal proceedings for the seizure and recovery of the timber.

It is conceded in the agreed statement that Schlierholz seized the timber in question "without resistance on the part of the persons in whose possession he found it," although over their protest, and that Schlierholz "believed that the said timber had been unlawfully cut

from the public domain; and that he reported the seizures immediately to the General Land Office, and his actions were approved by the Commissioner" (R., p. 10).

It is admitted that Schlierholz "believed"—that is to say, was "satisfied"—that the timber had been unlawfully cut from lands of the United States. The parties in possession made no resistance to its seizure. It therefore became his plain duty, under his oath and the instructions of his superior, to seize the timber and brand it as the property of the United States. This was all he did.

The only escape from the conclusion that Schlierholz was acting in the performance of his duty as special agent in seizing and branding the timber is to insist that the instructions of his Department, which are set forth in the agreed statement of facts, are unwarranted by law; in other words, that the Government of the United States has no right to make seizure of what it believes is its own timber in the possession of other persons, but must go to law in order to obtain possession of it.

The Department of the Interior, acting through the General Land Office and its special agents, has for many years asserted and exercised the authority to seize timber which it believed had been unlawfully cut from the public domain, and to dispose of such timber upon such terms as it deemed best for the public interest. The authority of the special agents of the Land Office to convey title to such timber came before this court in the case of *Wells* v. *Nickles* (104 U. S., 444), in which Mr. Justice Miller, speaking for the court, said:

> The Department of the Interior, under the idea of protecting from depredation timber on the lands

> of the Government, has gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced. In aid of this, the registers and receivers of the land offices have, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. If any authority from Congress to do this was necessary, it may be fairly inferred from appropriations made to pay for the services of these special timber agents.

Subsequently, in 1886, the Secretary of the Interior submitted to the Attorney-General the question whether the Commissioner of the General Land Office may direct the sale without advertisement of timber seized by his special agents as having been unlawfully cut from the public lands. This question was answered in the affirmative. (18 Op., p. 434.)

As preliminary to the authority to sell, the Attorney-General discusses the authority to seize, and after referring to the statutory remedies, by way of penalty and forfeitures, says (18 Op., 435):

> But these statutory remedies are not the only ones available to the Government. In *Cotton* v. *United States* (11 How., 229), it was held that the United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands. Agreeably to the doctrine of that case the United States may resort to the same civil remedies for the protection of their property which are open to any other proprietor. Thus *they may seize the timber cut*, arrest it by replevin, or recover damages in trespass for the taking and conversion (*United States* v. *Cook*, 19

Wall., 594). These are the ordinary remedies given by the common law for the recovery of personal property or its value. Seizure or recaption (which is one of them) is a remedy by the mere act of the party injured, and may be resorted to for the recovery of such property where its exertion will not endanger the public peace. (3 Black. Com., 4.)

Authority to exert this remedy in behalf of the United States must be deemed to belong to the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, as a power included in the general duties respecting the public lands which are devolved upon him (sec. 453, Rev. Stat.). Such authority, indeed, has long been asserted and frequently exercised by the Land Department through its officers or agents, the latter acting under instructions issued by the Commissioner, with the sanction of the Secretary. Referring to this, the Supreme Court, in *Wells* v. *Nickles* (104 U. S., 447), observes: [See quotation above.]

The above holding by Acting Attorney-General Jenks was expressly approved by Attorney-General Miller (19 Op., 710, 713).

In concluding this branch of the discussion I can not do better than quote the language of the court, speaking by Mr. Justice Miller, in the famous case of *In re Neagle* (135 U. S., 1, 65):

> The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are tres-

passers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles* (104 U. S., 444). That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the Government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the Government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by the instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

III.

THE UNITED STATES COURT WAS RIGHT IN INTERVENING TO PROTECT THE APPELLEE.

That Schlierholz simply did his duty as an officer of the United States in seizing and branding this timber is apparent. Is it any less apparent that the lower court only did its duty in protecting him from trial and possible fine and imprisonment at the hands of the local State authorities for thus doing his duty? If the United States is powerless to protect its agents while doing its work, it had better "shut up shop and go out of business." It is a well-known fact that there are communities which have grown rich through timber depredations. It goes without saying that a special agent of the General Land Office, charged with the duty of suppressing timber depredations and punishing timber thieves, is not viewed with favor in such a locality. The fearless discharge of duty exposes him to the risk of personal insult and injury. He needs all the protection the Government can give him. If the United States can not protect him against local indictments, it ought not to send him into such a locality, for without such protection he is sure to be indicted and just as certain to be convicted.

In the case at bar it must have been apparent to the prosecuting attorney and to the grand jurors who found these indictments that Schlierholz had simply done what he believed to be his duty in seizing and branding the timber. There was no personal end on his part. There was no act within the contemplation of the Arkansas statute. What Schlierholz did was done as an

officer of the United States. He seized the timber as the property of the United States and branded it as such. This did not prevent the parties who claimed the ownership from testing in a court of law whether the timber was or was not the property of the United States. It simply identified the timber. That was the object of the branding. This timber was in rafts on the White River. If not seized and identified, those in possession would undoubtedly have put it beyond the reach of either seizure or identification by the Government. There was, therefore, no wrongful intent in what Schlierholz did, and therefore no just ground for his indictment. It is a fair presumption, therefore, that his indictment was procured for the purpose of embarrassing him in the discharge of his duty as special agent of the Government, charged with suppressing the timber depredations then going on in Arkansas, and this brings me to the power and duty of the United States, when its officer and agent is thus attacked, to throw around him the protection of that authority which under the Constitution is supreme in this country. A reference to a few of the leading cases will be sufficient.

Section 753, Revised Statutes, expressly provides that the writ of habeas corpus shall extend to a person "in custody for an act done or omitted in pursuance of a law of the United States," which, we claim, is this case.

In *ex parte Siebold* (100 U. S., 371) this court, speaking by Mr. Justice Bradley, said (395):

> We hold it to be an incontrovertible principle that the Government of the United States may, by means of physical force, exercised through its

> official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.
>
> This power to enforce its laws and to execute its functions does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other except where both can not be executed at the same time. In that case the words of the Constitution itself shows which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land."

In the case of *Tennessee* v. *Davis* (100 U. S., 257) this court sustained the Federal statute authorizing the removal into the United States court for trial of an indictment found in the State court against a United States revenue officer for an act done in the discharge of his duty. In this case the Federal officer had shot and killed a citizen of Tennessee. He claimed the act was done in self-defense, while in the discharge of his duty as deputy collector, in attempting to seize an illicit distillery. Respecting the authority of the United States to protect its own officer in such a case this court, speaking by Mr. Justice Strong, said (p. 262):

> As was said in *Martin* v. *Hunter* (1 Wheat., 363), "the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and

> within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection, if their protection must be left to the action of the State court, the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

I have already quoted from the opinion of Mr. Justice Miller in the case of *In re Neagle*, in which the authority of the United States, through this writ, to protect its officer was amply sustained. It is to be observed that in this case the instructions issued by the Attorney-General to the marshal to furnish a deputy who should accompany Mr. Justice Field and guard him against the threatened assault from Judge Terry and his wife, was based upon the general power of the President under the Constitution, which declares that the President "shall take care that the laws be faithfully executed." This duty is

not limited to the enforcement of acts of Congress or treaties of the United States according to their express terms, but includes the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution. The court, in language I have already quoted, refers expressly to the millions of acres of public land, much of which contains valuable timber, as a thing to be protected by the President under this general power.

In the recent case of *Ohio* v. *Thomas* (173 U. S., 276), the writ was used to protect the governor of the Soldiers' Home in Ohio from an indictment by a State court for supplying the home with oleomargarine under circumstances violative of the Ohio law. The court held that the act of the governor in serving oleomargarine was authorized by Congress, and was therefore legal, any act of the State to the contrary notwithstanding. The court refers to the cases of *Tennessee* v. *Davis, supra; Ex parte Siebold, supra; In re Loney* (134 U. S., 372); and *In re Neagle, supra*, as authority for the use of the writ to protect the Federal officer against a State indictment for acts done in the discharge of his duty. The court further says, speaking by Mr. Justice Peckham, bottom of page 284:

> One of the grounds for making such a case as this an exception to the general rule laid down in *Ex parte Royall* (117 U. S., 241); *Whitten* v. *Tomlinson* (160 U. S., 231), and *Baker* v. *Grice* (169 U. S., 284), consists in the fact that the Federal officer proceeded against in the courts of the State may,

upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal Government might in the meantime be obstructed. This is such a case. In *Ex parte Royall*, it was stated by Mr. Justice Harlan, in naming some of the exceptions to the general rule there laid down, that "When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority."

Obviously this applies to the case at bar. The suppression of timber depredations by the Federal authority could be greatly embarrassed, if not effectively stopped, were the special agents subjected to trial in the local State courts and possible imprisonment in the local jails for acts done by them under instructions from their superiors and in the discharge of their duties.

In this same case (*Ohio* v. *Thomas*) the court refers to the authorities cited in *In re Waite* (81 Fed. Rep.,

359). This was a case where a United States pension examiner was indicted and convicted in an Iowa court for certain acts which he claimed he had done in the proper discharge of his duty. The writ was used to discharge him from the custody of the State authorities.

In the recent case of *State* v. *Adler* (67 Ark., 469) the effect of the discharge of Schlierholz on habeas corpus by the Federal court came before the supreme court of Arkansas, which said (p. 477):

> The Supreme Court of the United States *In re Neagle* (135 U. S., 1), in construing section 753, Revised Statutes, although regarded as having gone to the very verge of legal construction, as to one feature of the case, yet, in the main, expressed the generally accepted doctrine that a Federal officer is protected while in the discharge of the duties imposed upon him by law. The general principle is doubtless the correct one, as reasoned in the case of *Davis* v. *Tennessee* (100 U. S., 257), where it is also held that where a civil suit or criminal prosecution has been commenced in the State courts against an officer of the United States for acts done in the discharge of his official duties, the cause may be removed to the proper Federal court at once, and it is held in *Ex parte Royall* (117 U. S., 241), and many other cases, that the writ of *habeas corpus* furnishes a proper remedy in cases of criminal prosecution, the Federal courts having a sound discretion to exercise the jurisdiction before or after trial of the petitioner in the state courts. This is approved in *Ohio* v. *Thomas* (173 U. S., 276). Section 752, Revised Statutes of the United States, confers jurisdiction upon the justices and judges of the United States courts, as well as upon the courts

themselves, to hear and determine petitions for writs of *habeas corpus*, and section 763 of the same chapter provides that appeals may be taken from their decisions to the circuit court of the district. The cases touching this point have greatly multiplied in recent years, but it is unnecessary to make further citations. In the case at bar, the Federal judge who heard and determined the issues made by the petition and responses thereto in the *habeas corpus* proceedings found that Schlierholz was acting in the discharge of his duty as an officer of the General Land Office of the United States when he committed the offense charged against him in the State courts, if at all. He had, therefore, substantive jurisdiction of the cause.

JOHN K. RICHARDS,
Solicitor-General.

NOVEMBER 20, 1900.

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Supreme Court of the United States.

No. 122.—October Term, 1900.

The State of Arkansas and John A. Hinkle, as Sheriff of Independence County, Arkansas, Appellants,
vs.
Charles A. M. Schlierholz.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

[December 24, 1900.]

Two indictments were found by the grand jury of Independence County, Arkansas, against Schlierholz, appellee herein, for alleged violations of statutes of Arkansas. One indictment charged the taking possession, unlawfully, of certain timber; the other, the unlawful marking of timber. Upon such indictments Schlierholz was taken into custody by the appellant John A. Hinkle, as sheriff of Independence County. Thereupon Schlierholz presented a petition in *habeas corpus* to the judge of the District Court of the United States for the Eastern District of Arkansas. In said petition it was alleged, in substance, that the acts complained of in the indictments referred to were done by Schlierholz in the performance of his duty as a special agent of the General Land Office under the Department of the Interior of the United States. A writ of *habeas corpus* was allowed, and it was ordered to be served not only on Hinkle, the sheriff, but on the prosecuting attorney of the State of Arkansas for the third judicial circuit. Issue was joined by a return filed by said prosecuting attorney. On motion, the case was transferred to the District Court of the United States for the Northern Division of the Eastern District of Arkansas. Hearing having been had, the court found that Schlierholz, in the doing of the things complained of in the indictments, acted in the performance of his duty as a special agent of the General Land Office of the United States, and in strict conformity with the rules and regulations of the Secretary of the Interior, and that his arrest and detention were illegal and void. It was adjudged that the petitioner "be discharged from the custody of the sheriff under the writ in the petition and response set out and go hence without day." Thereupon, the court allowed an appeal to this court, and in the order doing so the following recitals are found:

"And at the request of the said State of Arkansas and John A. Hinkle, as sheriff, the following questions, among others involved herein, are certified to the said Supreme Court of the United States:

"1. Whether this court has jurisdiction in the premises to discharge the petitioner, Charles A. M. Schlierholz, from the custody of John A. Hinkle,

sheriff of Independence County, Arkansas, for the matters and things and under the circumstances set out in the record in this cause.

"2. Whether the proper order of this court under the facts should have been to remand said petitioner to the custody of the said sheriff of Independence County, Arkansas, to be dealt with by the Independence Circuit Court of the State, or to discharge him from said custody."

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

Before we can consider the principal propositions which have been argued at bar we must determine whether on this record jurisdiction exists to entertain this appeal.

The authority of this court to review the action of the court below must be found in one of three classes of cases, in which, by section 5 of the judiciary act of March 3, 1891, an appeal or writ of error may be taken from a District or Circuit Court direct to this court. The classes of cases alluded to are as follows:

1. Cases in which the jurisdiction of the court is in issue, in which class of cases the question of jurisdiction alone is to be certified from the court below for decision;

2. Cases involving the construction or application of the Constitution of the United States; and,

3. Cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

We are of opinion that the case at bar is not embraced within either of the classes of cases just mentioned.

As respects the first class, it was said in *Huntington* v. *Laidley*, (1900) 176 U. S. 676, as follows:

"In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of the court below. (*Maynard* v. *Hecht*, 151 U. S. 324; *In re Lehigh Co.*, 156 U. S. 322; *Shields* v. *Coleman*, 157 U. S. 168; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *Van Wagenen* v. *Sewall*, 160 U. S. 369; *Chappell* v. *United States*, 160 U. S. 499; *Davis* v. *Geissler*, 162 U. S. 290.)"

Now, on looking at the proceedings had prior to the judgment rendered below, we do not find even a suggestion that an issue was made and decided by the District Court as to the jurisdiction of that court to hear and determine the controversy presented by the petition in *habeas corpus* and the return thereto. On the contrary, the defense set forth in the return went simply to the merits, being based upon the contention that Schlierholz,

in the acts charged in the indictment, had acted outside of his instructions and contrary to law. Nor, if the record imported that an issue as to jurisdiction had been made in the trial court and had been by it decided, do the questions propounded to this court constitute a sufficient certification of such question of jurisdiction. The statements in the order allowing the appeal, setting forth the questions propounded for the decision of this court, whether considered by themselves or in connection with the record, cannot in reason be treated as "a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction." *Shields* v. *Coleman*, (1895) 157 U. S. 177. As declared in the case just cited, "no mere suggestion that the jurisdiction of the court was in issue will answer." But in the questions propounded by the District Court there is not even an intimation that the court, in the judgment rendered, did more than pass upon the merits of the controversy. In effect, the questions but imply that the court assumed that it had a discretion either to dispose of the case on its merits or to remand the accused to the State court and require him to resort to his remedy by writ of error, and that the instruction of this court was desired by the court below as to the proper exercise of its discretion in the premises. But the power to certify to this court other than jurisdictional questions is vested only in the Circuit Courts of Appeals. *Bardes* v. *Hawarden First National Bank*, (1899) 175 U. S. 526, 528.

As respects the second and third class of cases. The record does not lend support to the claim that any constitutional question was presented to the court below for its determination. Full opportunity existed in the return filed to the writ to set up any constitutional provision which might have been deemed adequate to defeat the application of Schlierholz for his discharge from custody. The only suggestion, however, of a contention based upon the Constitution of the United States is that contained in the assignment of errors made for the purpose of this appeal. Clearly, therefore, the record presents no constitutional question for review by this court, since it fails to disclose that a controversy on such subject was called to the attention of the court below prior to the hearing, and when it also does not appear that the court below considered or necessarily passed upon an issue of that character. *Chapin* v. *Fye*, (1900) 179 U. S. ——; *Loeb* v. *Trustees of Columbia Township*, 179 U. S. ——.

Dismissed for want of jurisdiction.

True copy.

Test:

Clerk Supreme Court, U. S.